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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JUAN PORTILLO,) Case No. 08-CV-0706-LAB (JMA)
12)
13) Petitioner,) **REPORT AND RECOMMENDATION**
14) **REGARDING RESPONDENT'S REQUEST**
15) **FOR STAY PENDING ISSUANCE OF**
16) **THE MANDATE IN HAYWARD v.**
) **MARSHALL**
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17 **I. Introduction**

18 On May 14, 1993, a jury convicted Petitioner of attempted
19 murder, and the court sentenced him to life in prison. (First
20 Amended Petition [Doc. No. 3] at 1-2.) Petitioner initiated this
21 action on April 16, 2008 and filed a First Amended Petition on
22 May 13, 2008. [Doc. Nos. 1 & 3] Petitioner raises a single
23 claim: that the Board of Parole Hearings violated his due process
24 rights by failing to consider his excellent institutional
25 behavior record and evidence of rehabilitation in finding him
26 unsuitable for parole. (First Amended Petition at 6-7.)

27 On July 7, 2008, Respondent filed a Request for Stay Pending
28 Issuance of the Mandate in Hayward v. Marshall, 512 F.3d 536 (9th

1 Cir. 2008) ("Request"). [Doc. No. 5] On May 16, 2008, the Ninth
2 Circuit granted en banc review in Hayward, and argument was heard
3 in the matter on June 24, 2008. Respondent states that two
4 issues necessary to the resolution of this Petition are at issue
5 in Hayward: (1) whether California has created a federally
6 protected liberty interest in parole for life inmates, and (2) if
7 a liberty interest is created, what process is due under clearly
8 established Supreme Court authority. Respondent requests that
9 the Court stay this federal Petition until such time as
10 challenges to Hayward are resolved and that decision becomes
11 final. (Request at 1-4.)

12 **II. Discussion**

13 In Hayward, a Ninth Circuit panel reversed then-California
14 Governor Davis's reversal of a parole date granted by the
15 California Board of Prison Terms (the "Board"). Hayward was
16 convicted of second degree murder in 1980, was sentenced to a
17 term of fifteen years to life and, at the time the Hayward
18 decision was filed, had served twenty-seven (27) years in prison.
19 Despite evidence of Hayward's stable social history and enhanced
20 ability to function within the law, Governor Davis reversed the
21 Board's decision and found Hayward unsuitable for parole. The
22 Ninth Circuit reversed, finding that "no evidence in the record
23 support[ed] a determination that Hayward's release would
24 unreasonably endanger public safety." Hayward, supra, 512 F.3d
25 at 544. That decision is now before the Ninth Circuit en banc.

26 A court has discretion to ensure the just and efficient
27 determination of a case by staying it pending the resolution of
28 other proceedings when a stay would be "efficient for its own

1 docket and the fairest course for the parties." Leyva v.
2 Certified Grocers of Cal., 593 F.2d 857, 863 (9th Cir. 1979).
3 Before issuing a stay, a court should consider "the possible
4 damage which may result from the granting of a stay, the hardship
5 or inequity that a party may suffer in being required to go
6 forward, and the orderly course of justice measured in terms of
7 the simplifying or complicating of issues, proof, and questions
8 of law which could be expected to result from a stay." Lockyer
9 v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005), citing
10 Landis v. North American Co., 299 U.S. 248, 268 (1936).
11 Additionally, a court should take into account the existence of
12 similar cases that are pending in the same district court, and
13 the probability that more are likely to be filed. Id.

14 The magistrate judge finds that the issuance of a stay in
15 this case will serve the interests of judicial order and economy.
16 Petitioner will not be damaged by such a stay (which is likely to
17 be of fairly short duration), and relevant questions of law may
18 be clarified by waiting for Hayward to be finalized. In
19 addition, as Respondent notes, the Ninth Circuit has sua sponte
20 stayed submission of several cases similar to this one until the
21 resolution of Hayward.

22 **III. Recommendation**

23 For the foregoing reasons, the undersigned magistrate judge
24 finds and recommends that the Court **GRANT** Respondent's Request
25 for Stay Pending Issuance of the Mandate in Hayward.

26 This Report and Recommendation is submitted to the Honorable
27 Larry A. Burns, United States District Judge assigned to this
28 case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

1 **IT IS ORDERED** that no later than September 12, 2008 any
2 party may file written objections with the Court and serve a copy
3 on all parties. The document should be captioned "Objections to
4 Report and Recommendation."

5 **IT IS FURTHER ORDERED** that any reply to the objections shall
6 be served and filed no later than September 19, 2008. The
7 parties are advised that failure to file objections within the
8 specified time may waive the right to raise those objections on
9 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449,
10 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
11 1991).

12 **IT IS SO ORDERED**

13 DATED: August 19, 2008

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15 Jan M. Adler
16 U.S. Magistrate Judge
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